UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Henry Peterson and Marilyn Peterson,

Plaintiffs,

v.

Carrington Mortgage Services, Inc. and Deutsche Bank National Trust Company,

Defendants.

Civil No. 12-0759 (MJD/JJG)

REPORT AND RECOMMENDATION

JEANNE J. GRAHAM, United States Magistrate Judge

This matter is before the Court on Defendants Carrington Mortgage Services, Inc. and Deutsche Bank National Trust Company's Motion to Dismiss (ECF No. 23). The Honorable Michael J. Davis, Chief United States District Judge, referred the motion to this Court for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) (ECF No. 25). For the reasons set forth below, the Court recommends that the motion be granted in part and denied in part.

I. BACKGROUND[1]

Plaintiffs Henry and Marilyn Peterson live at 6500 310th Avenue in Waseca, Minnesota. (Am. Compl. ¶ 1, ECF No. 20.) Defendant Carrington Mortgage Services, Inc. ("CMS") is a mortgage servicer, and Defendant Deutsche Bank National Trust Company ("Deutsche") is a national bank. (*Id.* ¶¶ 3, 4.)

On February 26, 2004, Plaintiffs executed a promissory note and mortgage in favor of All Cities Mortgage & Financial, which were later assigned to Deutsche. (*Id.* ¶¶ 5, 7.) Plaintiffs began suffering from health and financial problems in 2011 and, on April 4, 2011, asked CMS for help easing their mortgage payments. (*Id.* ¶ 9, 39.) CMS was the loan servicing agent for Plaintiffs' mortgage. (*Id.* ¶ 3.) CMS granted a six-month forbearance on April 7, 2011, and set Plaintiffs' monthly payments at $651.00. (*Id.* ¶¶ 10-11, 39.)

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[1] The facts set forth in this section are taken primarily from the Amended Complaint.

The forbearance agreement provided that the pending foreclosure action would be suspended, but any default or breach of the agreement would result in reinstatement of the foreclosure proceedings without any notice to Plaintiffs. (Loots Aff. Ex. D at 3, 9; ECF No. 28-1.) The agreement required strict performance by Plaintiffs. (*Id.* at 3, 9.) Under the agreement, Plaintiffs' first monthly payment was due on May 1, 2011. (*Id.* at 6). Plaintiffs did not make that payment on time. On May 3, 2011, a representative of CMS named Jamie sent an email to Marilyn Peterson, stating "that the payment had to be made by May 5, 2011 or the forbearance agreement would be canceled." (Am. Compl. ¶ 13.) Marilyn Peterson mailed the full monthly payment on May 4, 2011, and the postal worker told her the check would probably be delivered the next day. (*Id.* ¶¶ 14, 15.) Plaintiffs do not allege whether CMS received the check on May 5 or May 6, but in either event, CMS cashed the check on May 6. (*Id.* ¶ 16.)

Plaintiffs were served with a notice of foreclosure on May 26, 2011. (*Id.* ¶ 17.) A sheriff's sale was held on June 14, 2011, and the property was sold to Deutsche for $35,940.00, which was substantially less than the market value. (*Id.* ¶ 18.) Plaintiffs received a loan modification application on July 29, 2011, after the sheriff's sale. (*Id.* ¶ 20.) They returned the application to CMS on September 21, 2011, asking to be evaluated for a loan modification, but CMS never responded. (*Id.* ¶¶ 21, 30.)

Plaintiffs allege generally that CMS and Deutsche failed to comply with loan servicing standards and their obligations under the Home Affordable Modification Program (HAMP). (*Id.*

¶ 29.) Plaintiffs also assert five specific causes of action. Count 1 is for a declaratory judgment that the foreclosure is invalid, based on Plaintiffs' assertions that the May 2011 payment was timely and that Defendants breached the agreement by foreclosing. Through Count 2, Plaintiffs assert a claim for negligent and fraudulent misrepresentation, based on Jamie's alleged representation. Count 3 alleges a private right of action under Minnesota's mortgage servicer standards of conduct statute, Minn. Stat. §§ 58.13 and 58.18. Count 4 alleges a violation of RESPA. Count 5 is for breach of contract. As relief, Plaintiffs seek to invalidate the foreclosure of their home.

II. LEGAL STANDARDS FOR A MOTION TO DISMISS

Dismissal under Rule 12(b)(6) is proper when a plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Allegations that are "merely consistent with" liability are insufficient to create plausibility. *Id.* (quoting *Twombly,* 550 U.S. at 557).

Generally, the Court may not consider matters outside the pleadings on a motion to dismiss. *See Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). There are limited exceptions to this rule for matters of public record, judicial orders, documents necessarily embraced by the pleadings, and exhibits attached to the pleadings. *See id*. Here, both sides submitted documents outside the pleadings and relied heavily on those materials in their memoranda. Of particular note are the new factual assertions made by Plaintiffs' attorney in his memorandum of law[2] and Marilyn Peterson's affidavit (ECF No. 30), neither of which are properly considered in the context of a Rule 12(b)(6) motion. The Court considered only one document outside the pleadings, the forbearance agreement (Loots Aff. Ex. D), which is referenced in the Amended Complaint and the contents of which are not in dispute.

III. DISCUSSION

A. The Purported Modification of the Forbearance Agreement

Plaintiffs' claims for declaratory relief, violation of mortgage servicer standards of conduct, and breach of contract are all based on the premise that there was a valid modification to the forbearance agreement permitting the late payment. The forbearance agreement required Plaintiffs to pay $651.00 on May 1, 2011. (Loots Aff. Ex. D at 6.) Failure to remit a payment on the due date was a per se breach of the agreement. (*Id*. at 1.) Therefore, Plaintiffs must allege facts establishing that the forbearance agreement was modified to allow their late payment. To meet this burden, Plaintiffs contend that Jamie's email modified the forbearance agreement and extended the due date from May 1 to May 5.

The Minnesota Credit Agreement Act defines a credit agreement as "an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation." Minn. Stat. § 513.33, subd. 1(1). Plaintiffs concede that the forbearance agreement was a credit agreement, but they dispute that the alleged modification was also a credit agreement. Plaintiffs are mistaken in this respect. By statutory

[2] For example, Plaintiffs' attorney wrote: "The Petersons did not formally plead all details of all correspondence with CMS leading up to their forbearance. Nevertheless, some additional discussion is necessary as Defendants seem to imply that the Petersons waited until after May 1, 2011 to discuss with CMS a need to make the first payment after May 1, 2011." (Pls.' Mem. Opp'n Mot. Dismiss at 3.)

definition, the purported modification is a credit agreement, because it was an agreement "to make any other financial accommodation." *See id.* Alternatively, the purported modification was "an agreement to . . . forbear repayment of money." *See id.*

The Minnesota Credit Agreement Act further provides:

> Subd. 2. Credit agreements to be in writing. A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.
>
> Subd. 3. Actions not considered agreements. (a) The following actions do not give rise to a claim that a new credit agreement is created, unless the agreement satisfies the requirements of subdivision 2:
>
> > (1) the rendering of financial advice by a creditor to a debtor;
> >
> > (2) the consultation by a creditor with a debtor; or
> >
> > (3) the agreement by a creditor to take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies under prior credit agreements, or extending installments due under prior credit agreements.
>
> (b) A credit agreement may not be implied from the relationship, fiduciary or otherwise, of the creditor and the debtor.

Minn. Stat. § 513.33, subds. 2, 3.

In *Tharaldson v. Ocwen Loan Servicing, LLC*, the court addressed an alleged oral loan modification under the Minnesota Credit Agreement Act in the context of the plaintiffs' argument that a loan officer had verbally promised them a modification and lower monthly payment. 840 F. Supp. 2d 1156, 1162 (D. Minn. 2011) (Frank, J.). The court determined that the alleged loan modification was a credit agreement by statutory definition; thus, to be enforceable, the modification had to be in writing and signed by both parties. *Id.* at 1162-63. Because the modification was neither in writing nor signed, it could not be enforced. *Id.* at 1163.

Similarly, in *Myrlie v. Countrywide Bank*, the court first recognized that a mortgage agreement between the parties was a credit agreement under Minn. Stat. § 513.33, subd. 1. 775 F. Supp. 2d 1100, 1108-09 (D. Minn. 2011) (Ericksen, J.) (adopting the report and recommendation of Boylan, C. Mag. J.). By analogy, the court then concluded that "a loan modification agreement would constitute a credit agreement," and any claim based on "a loan modification agreement is barred by Minn. Stat. § 513.33, subd. 3(a)(3), unless the loan modification agreement is in writing, expresses consideration, and sets forth relevant terms and conditions, and is signed." *Id.* at 1109.

Most recently, in *Labrant v. Mortgage Electronic Registration Systems, Inc.*, the court rejected the precise argument made by Plaintiffs here:

> Plaintiffs attempt to circumvent the holdings of *Myrlie*, *Tharaldson*, *Olivares*, and *Sovis* by making a hyper-technical distinction that the agreement at issue was not a credit agreement because it was merely an agreement to modify a credit agreement—essentially, a modification to a credit agreement. . . . However, the Court in *Brisbin* rejected a similar attempt "to avoid the statute's reach" and stated that "the statute reaches not only 'credit agreements' themselves, but also any 'agreement by a creditor to take certain actions, such as . . . forbearing from exercising remedies under prior credit agreements.'"

Civ. No. 11-3029 (JRT/LIB), --- F. Supp. 2d ----, 2012 WL 1150879, at *4 (D. Minn. Apr. 6, 2012) (Tunheim, J.) (quoting *Brisbin v. Aurora Loan Servs., LLC*, No. 10-2130 (RHK/JJK), 2011 WL 1641979, at *3 (D. Minn. May 2, 2011)) (adopting the report and recommendation of Brisbois, Mag. J.).

The Eighth Circuit recently affirmed the district court's decision in *Brisbin*, one of the cases cited in *Labrant*, in *Brisbin v. Aurora Loan Services, LLC*, 679 F.3d 748 (8th Cir. 2012). Of particular relevance to the case at hand is the Eighth Circuit's interpretation of the phrase "any other financial accommodation," as used in Minn. Stat. § 513.33, subd. 1(1). *See id.* at 752.

The court construed this phrase to include an agreement to postpone a foreclosure sale. *Id.* While the phrase could not be expanded to all agreements favoring the debtor, it would include "promises to allow an opportunity to cure a loan default." *Id.* (citation omitted). This is precisely the situation here. Plaintiffs' failure to make their loan payment on May 1, 2011 was a default. They allege, however, that CMS promised them an opportunity to cure the default by granting an extension of time to pay. This is a "financial accommodation" and, thus, a credit agreement under Minn. Stat. § 513.33. As a credit agreement, it had to be signed by Plaintiffs and CMS to have legal effect. Because it was not, the alleged modification of the payment due date to May 5, 2011 is a nullity. Consequently, Plaintiffs cannot state a claim for an invalid foreclosure, a violation of mortgage servicer standards of conduct, or breach of contract, all of which depend on the validity of the alleged modification.

Plaintiffs' reliance on *McNeill v. Dakota County State Bank*, 522 N.W.2d 381 (Minn. Ct. App.1994), is misplaced. That case did not address questions arising under the Minnesota Credit Agreement Act, but whether a bank had a duty to warn a debtor before repossessing vehicles offered as collateral. *Id.* at 383-84. Nor does *McNeill* stand for the proposition that the acceptance of a late payment creates a new credit agreement, as Plaintiffs suggest.

In sum, even viewing the allegations in the light most favorable to Plaintiffs, the only reasonable inferences are that Plaintiffs did not timely remit the May 1 payment, and the parties did not modify the forbearance agreement to permit the late payment. Accordingly, Plaintiffs' claims for declaratory relief, violation of mortgage servicer standards of conduct, and breach of contract—all of which are premised on a timely payment and valid modification—should be dismissed.

B. No Ratification of the Late Payment

Plaintiffs suggest that Defendants ratified their late payment by depositing the check. But the forbearance agreement provided that when funds were received, CMS could apply an amount equaling one monthly payment against any delinquency, fees, foreclosure costs, expenses, or late charges. (Loots Aff. Ex. D at 3, 9.) When Plaintiffs failed to make a timely payment on May 1, they were in default. CMS was entirely within its rights to apply the late payment to the delinquency, foreclosure costs, or other expenses, without risk of ratifying Plaintiffs' breach.

C. RESPA and HAMP

Count 4 of the Amended Complaint specifically alleges a RESPA violation, and the Amended Complaint makes passing references to alleged HAMP violations. Plaintiffs voluntarily withdrew all RESPA and HAMP claims in their response to Defendants' motion to dismiss (Pls.' Mem. Opp'n Mot. Dismiss at 8) and verbally at the motion hearing. Accordingly, these claims should be dismissed.

D. Mortgage Servicer Standards of Conduct Claim

Although the Court has already concluded that Plaintiffs' claim under Minn. Stat. §§ 58.13 and 58.18 may be dismissed in light of the validity of the original terms of the forbearance agreement, the claim may be dismissed on an alternative ground, as well. The claim is premised entirely on Plaintiffs' assertion that Defendants violated a state or federal law regulating residential mortgage loans. (Am. Compl. ¶ 59.) However, Plaintiffs have not pled a violation of state or federal law. Consequently, the claim cannot be maintained.

E. Negligent/Fraudulent Misrepresentation

Defendants argue that Plaintiffs' claim for negligent or fraudulent misrepresentation fails as a matter of law because the alleged modification to the forbearance agreement was invalid.

Unlike Plaintiffs' other claims, however, this claim does not depend on whether the modification to the forbearance agreement was valid.

To plead a cause of action based on fraud in Minnesota, a plaintiff must allege

> (1) a false representation of a past or present material fact which was susceptible of knowledge; (2) the defendant knew the representation was false or made it without knowing whether it was true or false; (3) an intention to induce plaintiff to act in reliance on the misrepresentation; (4) the representation caused the plaintiff to act in reliance thereon; and (5) the plaintiff suffered pecuniary damage as a result of the reliance.

Tharaldson, 840 F. Supp. 2d at 1163 (citation omitted). To plead a claim of negligent misrepresentation, a plaintiff must allege:

> (1) in the course of his or her business, profession, or employment, or in a transaction in which he or she has a pecuniary interest, (2) the person supplies false information for the guidance of others in their business transactions, (3) another justifiably relies on the information, and (4) the person making the representation has failed to exercise reasonable care in obtaining or communicating the information.

Valspar Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359, 369 (Minn. 2009). Both fraudulent and negligent misrepresentation claims must be pled with particularity. *See Trooien v. Mansour*, 608 F.3d 1020, 1028 (8th Cir. 2010).

In the present case, Plaintiffs allege that Jamie represented on May 3, 2011 that unless Plaintiffs made their payment by May 5, the forbearance agreement would be canceled. A reasonable inference from this statement is that if Plaintiffs *did* make their payment by May 5, the forbearance agreement would *not* be canceled. Jamie's representation was false, according to Plaintiffs, because they made the payment on May 5, but the agreement was canceled nonetheless.

Plaintiffs further allege they reasonably relied on the representation in making the payment, that CMS intended to induce Plaintiffs' reliance, and that CMS knew or should have known Plaintiffs would rely on the representation. Plaintiffs also allege they suffered pecuniary harm when their mortgage was foreclosed. The Court finds these allegations sufficient to establish the "who, what, when, where, and how" of fraudulent misrepresentation. *See United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006).

As to negligent misrepresentation, it is reasonable to infer from the alleged facts that CMS had a pecuniary interest in the forbearance agreement. The falsity of the representation and reasonableness of Plaintiffs' reliance are adequately alleged, as discussed above. The failure of Jamie to exercise reasonable care in making the representation may be reasonably inferred from the substance of the representation itself, the subsequent cancelation of the agreement, and Plaintiffs' allegations of CMS's intent and knowledge. As such, Plaintiffs have adequately alleged a claim for negligent misrepresentation.

IV. RECOMMENDATION

Plaintiffs have failed to state a claim for relief on all of their claims but one. Accordingly, **IT IS HEREBY RECOMMENDED** that Defendants Carrington Mortgage Services, Inc. and Deutsche Bank National Trust Company's Motion to Dismiss (ECF No. 23) be **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Plaintiffs' claims for declaratory relief (Count 1), violation of Minn. Stat. §§ 58.13 and 58.18 (Count 3), violation of RESPA (Count 4), and breach of contract (Count 5), and any ostensible HAMP claim should be **DISMISSED**; and

2. Plaintiffs have adequately stated a claim for negligent and fraudulent misrepresentation (Count 2).

Dated: October 11, 2012

s/ *Jeanne J. Graham*
JEANNE J. GRAHAM
United States Magistrate Judge

NOTICE

Pursuant to District of Minnesota Local Rule 72.2(b), any party may object to this Report and Recommendation by filing and serving specific, written objections by **October 26, 2012**. A party may respond to the objections within fourteen days after service thereof. Any objections or responses shall not exceed 3,500 words. The District Judge will make a de novo determination of those portions of the Report and Recommendation to which objection is made. The party making the objections must timely order and file the transcript of the hearing unless the parties stipulate that the District Judge is not required to review a transcript or the District Judge directs otherwise.